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Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

PARTIES TO THE PROCEEDINGS

The additional petitioners are Michael Blatchley, Greg Boivin, Gary Carbone, Michael Christoforo, Ryan DiVito, Steven Durand, William Gambardella, Brian Jooss, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Edward Riordan, Timothy Scanlon, Benjamin Vargas, John Vendetto, and Mark Vendetto.

James Kottage and Kevin Roxbee were plaintiffs-appellants below with respect to claims not relevant in this petition. They have an interest in this proceeding only to the extent of their interest in those claims.

All respondents are listed in the caption. At all times relevant to this action, John DeStefano was Mayor of the City of New Haven, Karen Dubois-Walton was Chief Administrative Officer, Thomas Ude, Jr. was Corporation Counsel, Tina Burgett was Director of Personnel, and Boise Kimber was a member of the Board of Fire Commissioners. Respondents Malcolm Weber and Zelma Tirado were members of the City's Civil Service Board.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask the Court to issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit. This case gives the Court the opportunity to correct the Second Circuit's misapplication of Title VII and the Equal Protection Clause to civil service promotions, in a decision that conflicts with the decisions of other circuits and this Court, and that drew a strenuous dissent from six judges who thought the case should have been reheard en banc or failing that should be heard by this Court.

OPINION AND JUDGMENT BELOW

The district court's opinion, now reported at 554 F.Supp.2d 142, is reprinted in the Appendix at App. 5a-51a. The court of appeals's unpublished order is unofficially reported at 2008 WL 410436 and reprinted at App. 1a-4a. The *per curiam* opinion withdrawing the earlier order is reported at 530 F.3d 87 and reprinted at Supp.App. 1a-3a. The order denying rehearing en banc is reported at 530 F.3d 88 and reprinted at Supp.App. 4a-36a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331. The court of appeals issued a judgment on February 15, 2008, subsequently withdrew the

summary order on which that judgment was based, and entered a new judgment on June 9, 2008.[1] This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 *et seq.*, are lengthy and reprinted at App. 54a-58a.

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[1] Petitioners filed a petition for writ of certiorari for review of the Court of Appeals' February 15 judgment, No. 07-1428. However, the Second Circuit withdrew the order underlying that judgment and entered a new judgment on June 9, potentially rendering that petition moot. Petitioners therefore file this petition raising the same set of issues for the Court's review, and are moving contemporaneously to consolidate the petitions. Citations in the forms App., Supp.App., and Supp.Br. are to the Appendix, Supplemental Appendix, and Supplemental Brief submitted in that earlier petition, respectively.

STATEMENT OF THE CASE

Introduction

The case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil service examination and selection process because it does not like the racial distribution of the test scores. In 2003 the City of New Haven sought to fill captain and lieutenant vacancies in its fire department. Petitioners, New Haven firefighters and lieutenants, qualified for promotion to command positions pursuant to job-related examinations and merit-selection rules mandated by local law. Based on the race of the successful candidates,[2] city officials refused to promote petitioners and left the positions vacant in response to the racial distribution of the exam results, asserting their actions constituted "voluntary compliance with Title VII."

Petitioners sued alleging violations of Title VII and the Equal Protection Clause. They sought summary judgment based on respondents' race-based motivations, the undisputed validity of the exams, and the conceded absence of proof of an equally valid alternative to the exams with less racially disparate impact, and on the failure of respondents' action to survive strict scrutiny under the Equal Protection Clause.

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[2] All petitioners are white; petitioner Benjamin Vargas is Hispanic.

Respondents admittedly acted neither to remedy the effects of prior unlawful discrimination against minorities nor to achieve diversity. Instead, respondents insisted that it was irrelevant whether the exams were valid and whether there were any equally valid alternatives; they relied solely on their professed "good faith" belief that promoting petitioners based on the exams would violate Title VII. The correctness of that belief, they asserted, was also immaterial.

The district court granted respondents' cross-motion for summary judgment, finding that respondents wished to avoid "public criticism" for a perceived lack of diversity and the "political consequences" of a potential disparate impact suit by minorities. It did so notwithstanding what it described as "shortcomings" in the evidence of any available, equally valid alternative examination process with less racially adverse impact. App. 47a.

Breaking from other courts of appeals, the Second Circuit held that a promotion examination's unintended disproportionate racial results permit municipalities to reject successful candidates based on their race, a judgment that finds no support in the statute or the Court's Title VII decisions. Supp.App. 4a-6a. The Second Circuit further held the Equal Protection Clause inapplicable to such actions and thus refused to apply strict scrutiny. *Ibid.*

New Haven Civil-Service Practices

New Haven's Charter and Civil Service Regulations mandate hiring and promotions based strictly

on merit as determined by competitive examination. After each examination, the Civil Service Board must certify a list of those eligible for promotion. A "rule-of-three" requires filling each vacancy from among the top three scorers on the list to curtail political patronage and other improper favoritism and to ensure selection of the most knowledgeable candidates. App. 74a-86a.

The Connecticut Supreme Court has consistently mandated strict compliance with civil service laws, citing the public interest in the most able workforce free of the corruption and ills of the spoils system. See, *e.g.*, *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005). Yet by 2004, the DeStefano administration had drawn multiple, stern rebukes from state judges for "blatant lawlessness" in employing "charades" and "subterfuges" to flagrantly subvert merit selection rules[3] and stood accused of intentionally discriminating against whites and manipulating promotion exam results for political gain. *Ibid.* Respondent Ude, the city counsel, citing his disagreement with these judges, dismissed their opinions as nonbinding and authorized city officials to continue the illegal practices. App. 935a-937a.

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[3] See *Henry* v. *Civil Serv. Comm'n*, 2001 WL 862658 (Conn. Super. July 3, 2001); *Bombalicki* v. *Pastore*, 2001 WL 267617 (Conn. Super. Feb. 28, 2001), aff'd, 71 Conn. App. 835 (2002); *Hurley* v. *City of New Haven*, 2006 WL 1609974 (Conn. Super. May 23, 2006).

Respondents engaged Industrial/Organizational Solutions, Inc. ("IOS"), a professional testing firm with experience in public safety, to develop the 2003 exams. The exams were designed to screen out those without the knowledge, skills, and abilities (KSAs) necessary for minimally competent performance in the positions. Since New Haven routinely experiences racial disparities in testing outcomes, IOS went to great lengths to mitigate such impact as far as possible without compromising the integrity of the exams. IOS analyzed the jobs and validated the tests at length and in detail in accordance with EEOC-recommended practices. See 29 C.F.R. §§1607.5, 1607.14, 1607.16; App. 329a-335a.

The exams consisted of a written job knowledge examination followed by a comprehensive structured oral assessment of applicants' skills and abilities to command others in emergency response. Applicants were permitted to proceed to the second phase irrespective of their performance on the written exam. The cutoff composite score was calibrated to equate with minimal competence.

All candidates were race-coded. The results revealed racial disparities in pass rates and levels of KSAs for those who did pass, mirroring adverse impact ratios in previous exams. App. 384a-385a, 423a-427a, 950a-957a. Because of the limited number of vacancies, civil service rules meant that the new lieutenants "w[ould] all be white" and non-Hispanic as

would all but one or possibly two Hispanic captains. App. 439a-445a, 465a-476a.

Respondent Kimber, a local preacher and valuable vote-getter for Mayor DeStefano, who served as an influential member of the Board of Fire Commissioners, contacted the mayor's office and made it clear he wanted the promotions scuttled after learning of the race of the top scorers. App. 812a-816a, 882a. In respondents' early strategizing to that end, *e.g.*, App. 449a; see App. 446a-459a, they agreed to adopt publicly a neutral position on certification while privately collaborating toward Kimber's desired result.

Respondents' initial effort to impugn the validity of the examinations failed when IOS refused to concede nonexistent flaws in the tests. According to IOS Vice-President Chad Legel, respondents rebuffed his attempts to discuss validity and focused instead on the "racial" and "political" overtones of the situation. App. 329a-335a. Industry protocol called for issuing a technical report which elaborates in detail the exams' content validity and scoring methodology and establishes lawful use of test results for selection notwithstanding adverse impact. *Ibid.* Respondents had previously accepted such reports and proceeded with selections. See App. 958a-1011a. IOS stood ready to issue a technical report validating the 2003 exams, but respondents prevented its issuance. App. 329a-335a.

What would have been a ministerial certification[4] of the captain and lieutenant lists by the Board was interrupted by a letter from respondent Ude raising the specter of a Title VII violation and respondents' providing to the Board eligibility lists that included candidates' race codes but, unprecedentedly, were name-redacted.[5] Despite IOS's explicit request that respondent Burgett share with the Board IOS's letter noting its confidence in the exams' validity and respondents' decision to abort production of the validity report, she did not do so. App. 190a-191a, 287a, 336a-339a, 429a-436a.

The Board met four times. Attempting to establish the availability of equally valid alternative tests with less adverse impact, respondents solicited three professionals to offer opinions to the Board, among them Christopher Hornick, IOS's fiercest business competitor, who spoke briefly to the Board by telephone. Neither Hornick nor Janet Helms, a professor of race and culture with no expertise in public safety, examined the tests, their development, or validation. App. 545a-563a, 569a-574a, 1030a. The third consultant, and the only one to actually study the exams, was Vincent Lewis, a highly credentialed expert in fire and homeland security services. Lewis, who is

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[4] New Haven civil service regulations define "certify" as "[t]he process of supplying an appointing authority with the names of eligibles for appointment." App. 89a.

[5] Petitioners submitted to the district court mock eligibility lists showing the successful candidates' names in rank order. App. 390a, 437a-438a.

African-American, thought well of the exams and believed they measured the KSAs that commanders must possess. App. 563a-569a.

At the Board's final meeting, respondents urged abandoning the lists in favor of unspecified alternatives, citing Hornick's remarks and dismissing Lewis's. Two alderpersons urged the Board not to certify for the sake of "diversity" and "civil rights" requirements. App. 458a-459a, 484a-489a, 575a-582a. Not allowed to speak were the NHFD's Chief and (African-American) Assistant Chief, although both were involved in the exam development process and selecting the exams' syllabi. Both thought the exams were fair and valid and the results should be respected. Although respondents denied any improper motive in excluding the NHFD's top two officials, Fire Commissioner Kimber was allowed to disrupt the Board's proceedings, voice objections to the promotions, and threaten Board members with political reprisals. App. 389a-390a, 467a-468a, 817a-818a, 833a, 846a-852a. The Board deadlocked and the promotions were scuttled.[6] App. 586a-589a.

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[6] Only four members voted; respondents Weber and Tirado voted against certification. The nonvoting fifth member was the sister of one of the unsuccessful minority candidates who met with Dubois-Walton to influence the city's positions. App. 829a-831a.

The Proceedings Below

Petitioners sued, alleging violations of Title VII and the Equal Protection Clause. Respondents conceded, in admissions disregarded by the district court, that they "never alleged that [they] took any action to remedy prior discrimination" and that achieving racial diversity in the NHFD ranks was wholly irrelevant. The decision, they insisted, stemmed solely from their "good faith" belief that promoting the petitioners would violate Title VII. App. 938a-947a, 1013a-1037a.

Dubois-Walton testified that it was never respondents' position that the exams were invalid. She understood IOS validated the tests. The city's chief civil service examiner could discern no flaws in the written exams. Candidate ratings in the oral assessment, conducted by ten three-member panels of fire service professionals recruited nationwide, demonstrated high levels of reliability and consistency within and across panels. What Dubois-Walton understood from Hornick was that exam alternatives, particularly the "assessment center" approach to testing, might exist that "may have" less adverse impact. Petitioners introduced Hornick's own publications, which directly contradict this suggestion. App. 390a, 592a, 746a-804a, 848a, 853a-856a.

Respondents conceded they had no evidence the exams were invalid. When pressed to identify a specific alternative, they advised the district court that they hoped to "conduct studies" and "explore" for

one, and considered the question as one "for another day." App. 1022a, 1027a, 1016a-1038a.

The district court granted summary judgment for respondents on petitioners' Title VII and equal protection claims. Despite the absence of any equally valid alternatives, the district court nonetheless stated: "[I]t is not the case that defendants must certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method."[7] App. 34a. Resolving the contested issue of respondents' motivation, the district court found

> "[respondents] acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend." App. 47a.

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[7] EEOC guidelines advise that a "selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. §1607.4(D).

Elsewhere, the court observed the tests' "undesirable outcome" could "subject the City to Title VII litigation by minorit[ies] and the City's leadership to political consequences." Addressing petitioners' assertion that respondents' professed fidelity to Title VII was a pretext for intentional race discrimination against them and patronage benefits for the Mayor's and Kimber's political allies, the court disagreed the "political context" altered the analysis. Even if "political favoritism or motivations" were "intertwined with the race concern," that "does not suffice" to establish a violation of rights. App. 24a, 43a, 47a. Relying principally on holdings predating the 1991 amendments to Title VII and this Court's modern equal protection jurisprudence, the district court found no racial classification occurred.

The Second Circuit, by summary order entered February 15, 2008, adopted the district court's opinion and affirmed its judgment, concluding that "the [Board] found itself in the unfortunate position of having no good alternatives . . . [B]ecause the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." App. 3a-4a.

After the panel entered judgment, a judge of the court of appeals *sua sponte* requested a poll on rehearing en banc. On June 9, 2008, after the poll was concluded but before the court had announced the poll or its result, the panel withdrew its summary order and simultaneously issued a *per curiam* opinion

virtually identical to the summary order.[8] See Supp.App. 4a-6a. The clerk of the court of appeals entered a new judgment that same day.

Three days later, the Second Circuit announced it had voted 7-6 to deny rehearing en banc. The panel apparently converted its summary order to a binding precedential opinion while the opinions on denial of rehearing en banc were in production. Judge Parker, concurring in the denial of rehearing, argued that the panel opinion comported with prior circuit precedents, particularly *Bushey* v. *New York State Civil Service Commission*, 733 F.2d 220 (CA2 1984), that the refusal to certify the test results was "facially race-neutral," and that respondents' purported "desire to comply with, and avoid liability under, Title VII" did not constitute intent to discriminate. Supp.App. 7a-10a. Judge Calabresi, also concurring, opined that the court was foreclosed from reaching the interesting question—whether a government incurs liability for "race-neutral actions that have racially significant consequences" and that are "motivated only by a desire to comply with federal anti-discrimination law"—by petitioners' failure, in his view, to argue that respondents had mixed motives.[9] Supp.App. 30a-32a.

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[8] The panel's *per curiam* opinion deleted one word—"substantially"—from the first sentence of the summary order.

[9] Judge Calabresi was incorrect on this point. See Supp.Br. 6 n.5, 9 n.7 (noting that petitioners addressed this issue below, stating that mixed motives is an affirmative defense and

(Continued on following page)

Writing for all six dissenting judges, Judge Cabranes observed that this case "raises important questions of first impression in [the] Circuit—and indeed, in the nation—regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices." Supp.App. 11a-12a. He noted that the majority's evident view that "any race-based employment decision undertaken to avoid a threatened or perceived Title VII" violation "raises novel questions that are indisputably of exceptional importance," Supp.App. 11a-12a, 28a-29a, among them:

> "Does the Equal Protection Clause prohibit a municipal employer from discarding examination results on the ground that too many applicants of one race received high scores and in the hope that a future test would yield more high-scoring applicants of other races? Does such a practice constitute an unconstitutional racial quota or set-aside? Should the burden-shifting framework applicable to claims of pretextual discrimination ever apply to a claim of explicit race-based

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suggesting that a workable application of mixed-motive analysis in this case is problematic because respondents never placed into the mix a *non*-race-based reason for their actions). In addition, the Center for Individual Rights, in an amicus brief to the court of appeals, noted the district court erroneously characterized this case, and specifically the question of respondents' motivation in refusing to promote petitioners, as falling under the familiar burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

> discrimination in violation of Title VII? If a municipal employer claims that a race-based action was undertaken in order to comply with Title VII, what showing must the employer make to substantiate that claim?" Supp.App. 13a.

Judge Cabranes declared the dissenters' "hope that the Supreme Court will resolve the issues of great significance raised by this case" and affirmed that petitioners' claims "are worthy of that review." Supp.App. 13a, 30a.[10]

REASONS FOR GRANTING THE PETITION

This case presents a clear opportunity to settle issues that continue to plague state and municipal civil service by sparking competing claims of discrimination and reverse discrimination. These issues have implications in a broad range of merit and other selection mechanisms throughout our society. Neither the Constitution, Congress, nor this Court has authorized public officials and lower federal courts

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[10] Indeed, the fact that the "difficult issues" presented in this case are "sharply defined for the Supreme Court's consideration" provided Judge Katzmann's deciding vote against rehearing en banc. Supp.App. 6a. Chief Judge Jacobs, dissenting, disagreed with Judge Katzmann about the issue of en banc rehearing but agreed that the case presented "exceptionally important issues" that are "important enough to warrant Supreme Court review." Supp.App. 36a.

to engage in intentional race discrimination by reintroducing race-consciousness into a merit selection process that had been purged of it, under the guise of avoiding phantom Title VII liability. To justify that result the Second Circuit adopted a radical disparate-impact theory that effectively nullifies important exemptions and other provisions in Title VII and emboldens those who view the Equal Protection Clause and Title VII as guarantees not of equal opportunity but of equal results. That theory sets the Second Circuit squarely at odds both with the holdings of other circuits and with this Court's interpretations of the Clause and Title VII.

I. THE SECOND CIRCUIT'S SUBSTANTIAL DEPARTURE FROM THIS COURT'S EQUAL PROTECTION HOLDINGS WIDENS ITS DIVISION FROM OTHER CIRCUITS.

A. The Refusal To Apply Strict Scrutiny Is At Odds With This Court's And Other Circuits' Holdings.

"Racial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination." *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 291 (1978)). The court of appeals considered that respondents reacted to the "racial distribution of the results" and were concerned that "too many whites and not enough minorities would be promoted," and

that but for these concerns, petitioners "would have had an opportunity to be promoted," but nonetheless refused to subject this race-based deprivation to strict scrutiny.[11] App. 24a-25a. The court reasoned that since "the result was the same for all . . . and nobody was promoted," there was no racial classification. App. 45a. This conclusion squarely conflicts with the decision of the Eleventh Circuit which, under similar circumstances, held "that a decision not to *create* new positions that is based solely upon the race and gender of the next eligible candidates for promotion" constitutes a racial classification that violates the Equal Protection Clause. *Williams* v. *Consol. City of Jacksonville*, 341 F.3d 1261, 1269 (CA11 2003).

The Second Circuit's error is apparent: those who fail exams have no right to be promoted; to the contrary, under local law they are excluded from consideration. Local law entitled petitioners not to be treated the same as everyone who took the exam, but treated differently based on whether they passed the exams and the level of KSAs their exam performance demonstrated. Respondents did not treat petitioners the same as others without regard to race; they took action, because of petitioners' race, to prevent petitioners from being promoted when they would otherwise have been. For that reason, the Second

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[11] Because the Second Circuit adopted the decision of the district court, the reasoning in the district court's opinion on summary judgment is attributed to and quoted as that of the court of appeals.

Circuit was incorrect (and cavalier) to characterize their injuries as negligible.[12] Moreover, the court's reasoning ignores that it was petitioners' race that directly and admittedly drove respondents' decision to promote no one. This is especially curious because, for Title VII purposes, the court assumed petitioners suffered a race-based adverse employment action, while incongruously holding that no racial classification occurred for equal protection purposes. App. 25a.

The Court has clearly held that "[r]ace-based government decision making is categorically prohibited unless narrowly tailored to serve a compelling interest," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2770 (2006) (Thomas, J., concurring), and has confined it to narrowly tailored remedies for prior constitutional violations and use as a nondispositive factor in professional-school

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[12] The court held petitioners' injuries amounted to nothing beyond "frustration" and "uncertainty" about their futures, App. 3a, 42a n.11, an incorrect characterization upon which the court rested its conclusion that no race-based "injury" or "disadvantage" occurred to trigger constitutional scrutiny. Petitioners were deprived of salary increases attendant to promotion, losses which continue to accrue and depress their pensions. The court further ignored that petitioners, their careers stalled in 2004, remain ineligible for further advancement, as incumbency as lieutenant or captain is a prerequisite for promotion to still higher ranks. And, in doing so, the court likewise ignored Title VII's provision prohibiting actions which "would deprive or tend to deprive any individual of employment *opportunities* or otherwise adversely affect his status" because of his race. 42 U.S.C. §2000e-2(a)(2) (emphasis added).

admissions. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). Outside these contexts, the "exacting scrutiny" required by the Equal Protection Clause "has proven automatically fatal in most cases." *Parents Involved*, 127 S.Ct., at 2770 (Thomas, J., concurring) (quotation omitted). Moreover, before a government may use race in making decisions, it must have "a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S., at 500 (quoting *Wygant*, 476 U.S., at 277 (plurality opinion)).

The Second Circuit's conclusion that respondents were "protected" because they "[w]ere simply trying to fulfill [their] obligations under Title VII," Supp.App. 3a, underscores the court's conclusion that racially discriminatory decisions nonetheless satisfy constitutional muster when cloaked as putative efforts to comply with Title VII and EEOC Guidelines. This *non sequitur* has been expressly rejected by the Seventh Circuit:

> "How can that be? Then Congress or any federal agency could direct employers to adopt racial quotas, and the direction would be self-justifying: the need to comply with the law (or regulation) would be the compelling interest. Such a circular process would drain the equal protection clause of meaning." *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004), cert. denied, 543 U.S. 1152 (2005).

Circuits applying these principles to civil service testing cases have properly focused on the Constitution, not Title VII. In *Biondo*, the Seventh Circuit held that neither Title VII nor the Equal Protection Clause permit a city to respond to a promotional examination's disparate impact by employing dual eligibility lists. 382 F.3d, at 684; see Part III *infra*. Other courts of appeals have rejected similar rationales advanced to justify race-based preferences. See, *e.g.*, *Dean* v. *City of Shreveport*, 438 F.3d 448 (CA5 2006) (reversing dismissal of white firefighter applicants' equal protection claims where the record, beyond statistical evidence of racial disparities, did not establish a constitutionally permissible basis for denying them hire); *Quinn* v. *City of Boston*, 325 F.3d 18 (CA1 2003) (holding city officials violated the clause in refusing to hire top-scoring whites on entry-level firefighter exam); *Dallas Fire Fighters Assn.* v. *City of Dallas*, 150 F.3d 438 (CA5 1998) (finding promotion of women and minorities over higher-ranked white males violated the clause with no need to address validity under Title VII); *Md. Troopers Assn.* v. *Evans*, 993 F.2d 1072 (CA4 1993) (the clause forbids the state from classifying promotional candidates by race except as a narrowly tailored and last-resort remedy for intentional discrimination). The Second Circuit through this decision has deliberately put itself in conflict with these cases, necessitating review by the Court to secure national uniformity on this important constitutional question.

Respondents' admitted aim was not to remedy the effects of prior intentional race discrimination but merely to avoid the failure of valid promotional exams to yield racially proportional demographic results. Government employment practices with racially disparate impact do not violate the Constitution without racially discriminatory intent. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."). Indeed, "[t]he Court has noted the danger that relying solely on statistical disparities as proof of discrimination under Title VII could result in the imposition of de facto quotas." *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487, 494 (CADC 1998) (citing *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 991-97 (1988) (plurality opinion)); see Part II.B *infra*. The Second Circuit not only falsely equates adverse impact with a statutory violation but mistakenly concludes that an imagined violation provides a constitutional basis for remedial measures, another notion rejected in the Seventh Circuit and elsewhere:

> "If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm, and as a practical matter *Washington v. Davis* would be undone. Congress did not attempt this; to the contrary, it provided in 42 U.S.C. §2000e-2(j) that an employer's desire to mitigate or avoid disparate impact

> does *not* justify preferential treatment for any group." *Biondo*, 382 F.3d, at 684.

See, *e.g.*, *Lutheran Church-Missouri Synod*, 154 F.3d, at 494 (applying strict scrutiny to FCC equal-employment opportunity regulations challenged on equal protection grounds and stating that "in some situations unequal treatment is justified to account for past discrimination, but societal discrimination is not enough to justify imposing a racially classified remedy").

B. The Opinion Endorses Racial Balancing.

The Court has repeatedly admonished that "outright racial balancing" is unconstitutional. *Croson*, 488 U.S., at 507; *Grutter*, 539 U.S., at 330. The district court couched its support for respondents' efforts to ensure proportional representation in its consideration of ostensibly neutral ministerial acts: respondents' refusal to "validate" exams, "certify" eligible lists, or act on the results of "presumptively flawed" tests. To these euphemisms for racial balancing, the court of appeals added another: a city "simply trying to fulfill its obligations under Title VII."

But "[t]he principle that racial balancing is not permitted is one of substance, not semantics." *Parents*

Involved, 127 S.Ct., at 2758. Just as "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity,'" *ibid.*, neither does it mutate when styled as "voluntary compliance" with Title VII or a city's response to the "unfortunate position of having no good alternatives" to racially disproportionate test results. Supp.App. 2a. Among the many purposes of strict scrutiny is to "smoke out" instances of "racial politics" masquerading as remedial action. *Croson*, 488 U.S., at 493. Unchecked, racial classifications "can lead to corrosive discourse" and use of race "as a bargaining chip in the political process." *Parents Involved*, 127 S.Ct., at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, in *Parents Involved*, the Court noted that the very rationale offered by officials in that case to justify racial balancing in public schools could logically extend to many other government arenas, including the civil service. 127 S.Ct., at 2779 (Thomas, J., concurring).

Other circuits, in contrast, have understood and properly applied these basic principles. In *Williams* v. *Consolidated City of Jacksonville*, 341 F.3d 1261 (CA11 2003), the Eleventh Circuit squarely held that the Equal Protection Clause does not permit city officials to refuse to fill existing vacancies because of the race of those in line for them on a civil service eligibility list. See also *Afro-Am. Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719, 724 n.5 (CA11 1989) (noting disagreement with the contention that

because "no promotions were made when the test was abandoned, . . . therefore no rights of non-minority candidates were violated"). The court of appeals found *Williams* unpersuasive because, unlike the Jacksonville officials, respondents did not "certify" the lists. App. 40a n.10. But that is a distinction without a difference; it does not matter what mechanical means are employed to accomplish the same prohibited end.

Further, respondents' attempt to cloak their refusal to honor unbiased test results in Title VII garb cannot obscure that respondents reacted to racial disparity by denying petitioners earned promotions and setting aside the vacancies for those of a different race until respondents can devise a means to award them at least some of the positions. The proportionality respondents seek is nothing more than racial balancing, and it is patently unconstitutional.

C. The Opinion Permits Race Politics To Masquerade As Voluntary Title VII Compliance.

It invites mischief to relax established constitutional standards of scrutiny based on government actors' purported "voluntary compliance" with Title VII. At best, it forces well-meaning officials to navigate between discrimination's Scylla and reverse discrimination's Charybdis. At worst, it gives unscrupulous officials cover to yield to the demands of

organized racial lobbies, with Title VII as a convenient, unassailable pretext.

The city's unprecedented refusal to fill promotional vacancies as required by its charter took place in a politically and racially charged context. Board members faced not only organized pressure from the administration and the urgings of local legislators, but threats of "political ramifications" from a local power-broker, respondent Kimber, who also happened to be one of the fire commissioners charged with filling the vacancies from the eligible lists. App. 235a-236a, 305a-306a, 1032a.

This is a classic example of the "race politics" this Court warned might lurk behind racial classifications not held to the exacting strictures of the Equal Protection Clause. The court of appeals cast the crude politics in this case in frankly approving terms. Its ruling allows recalcitrant elected officials and others hostile to this Court's equal protection holdings to accomplish an equal results agenda *sub rosa*. The Second Circuit's approval will powerfully encourage other municipalities and states to pursue the same strategy. That should be prevented by the Court's correcting this deviation from the Constitution and the Court's jurisprudence and resolving the division in the circuits that it creates.

D. The Denial Of Certiorari In *Bushey* By A Divided Court Favors Review.

The Second Circuit's holding in *Bushey* drove respondents' conduct and the outcome of this litigation. See App. 37a-39a, 439a-445a. A sharply divided Supreme Court denied certiorari in *Bushey*. *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 469 U.S. 1117 (1985). Then Justice Rehnquist, joined by Chief Justice Burger and Justice White, considered *Bushey* constitutionally suspect and its rationale "unpersuasive." *Id.*, at 1119-1121. In their view, the Second Circuit "reache[d] questionable conclusions on difficult and important questions." *Bushey* arose from nearly indistinguishable facts, including an admittedly political response to professionally developed job-related exams. See *id.*, at 1117-1118 (recounting New York's decision to normalize test results by race in response to statistical disparity and fear of a Title VII lawsuit by unsuccessful minority examinees). Justice Rehnquist, noting the absence of any evidence that New York had utilized civil-service tests to purposefully discriminate against minorities, observed that the state reacted to mere statistical disparity—and "at least in part because it fear[ed] a lawsuit by minority applicants"—by choosing to "discriminat[e] against similarly situated nonminority applicants." *Id.*, at 1120. Expressing concern that *Bushey* would permit public agencies to "claim that their actions [are] shielded under Title VII even if the actions would violate the Fourteenth Amendment," the very premise of the judgment in this case, Justice Rehnquist preferred to address the "difficult

questions" posed by the Circuit's approval of race-based measures to alter the outcome of a civil service examination. *Id.*, at 1121 That these important questions persist twenty-three years later, and now sharply divide the Second Circuit, demonstrates the need for this Court to grant the petition and resolve them. As noted, the Second Circuit's clear rejection of the contrary law in other circuits makes clear that this conflict will not resolve itself and can only be answered by the Court's intervention.

II. THE SECOND CIRCUIT'S INTERPRETATION OF TITLE VII CONFLICTS WITH THE STATUTE AND HOLDINGS OF THIS COURT AND OTHER CIRCUITS.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers "to fail or refuse to hire" or otherwise discriminate against an individual in the "terms, conditions, or privileges of employment because of such individual's race." 42 U.S.C. §2000e-2(a)(1). The "disparate impact" theory originated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in which this Court invalidated a private-sector employer's use of job-irrelevant criteria that largely disqualified African-Americans from employment. However, in the context of job-relevant employment criteria, unlawful disparate impact requires the availability of an equally valid alternative with less disparate impact, which the employer refuses to adopt. 42 U.S.C. §2000e-2(k); see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). It is this refusal

that permits a court to infer unlawful action and indicates that the employer was using its tests merely as a pretext for discrimination. *Albemarle*, 422 U.S., at 425.

The decision in this case ignores this required framework for disparate-impact analysis and, as a result, wrongly allows employers to racially discriminate as a purportedly remedial response to statistical evidence of disparate impact without any basis for inferring unlawful discrimination from the underlying disparity. The Second Circuit simply refused to hold employers who use race-conscious means voluntarily to remedy perceived disparate-impact discrimination to the same high standard required for an employee to show an employment practice with a disparate impact is discriminatory. That refusal underscores the division between the Second Circuit and other circuits that do recognize the critical importance of evidence beyond statistical disparity before a court may infer unlawful discrimination.

A. The Second Circuit Wrongly Equates Adverse Impact With A Title VII Violation.

The court of appeals plainly considers a *prima facie* case or even mere statistical evidence of adverse impact sufficient to justify voluntary race-based measures by a public employer. The court based its conclusion on Second Circuit precedents, which

themselves suggest that something less than a *prima facie* case will do:

> "[A] showing of a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated, voluntary race-conscious remedies . . . In other words, a *prima facie* case is one way that a race-conscious remedy is justified, *but it is not required*: all that is required is a sufficiently serious claim of discrimination to warrant such a remedy." App. 37a (emphasis added; quoting *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (CA2 1984), and *Kirkland* v. *N.Y. State Dept. of Corr. Servs.*, 711 F.2d 1117, 1130 (CA2 1983)).

This conclusion not only directly conflicts with this Court's holding in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 576-579 (1978) (*prima facie* case does not equate with a finding of discrimination and "courts may not impose . . . a remedy [for racial imbalance] on an employer at least until a violation of Title VII has been proved"), but also with *Albemarle's* definition of adverse impact as but a first step in the discrimination analysis, 422 U.S., at 425. The incongruity is glaring, given that the court acknowledged petitioners' *prima facie* case of intentional discrimination under Title VII, in which the petitioners' race was clearly the motivating factor for the adverse employment action, yet declared a competing *prima*

facie case of *unintentional* disparate impact the summary winner without any evidence whatsoever that would permit an inference that the disparity was unlawfully discriminatory. Once again, the Second Circuit's analysis is out of step with the Court's and other circuits' jurisprudence and needs to be corrected through certiorari review.

B. The Second Circuit's Construction Of Title VII Vitiates The Disparate-Impact Framework And Evidentiary Standards Established By This Court.

Proof that an employer was presented with but refused to adopt an equally valid alternative test with less adverse impact is the *sine qua non* of Title VII liability. Respondents tried but failed to make that demonstration. Years after the Board vote, respondents merely advised the district court that they wished to "conduct studies" and "explore" for alternatives. This judicial bypassing of a core requirement contravenes both the Court's holdings and the express text of §2000e-2(k), which states that unlawful disparate impact is established *only if* the complaining party demonstrates that such an equally valid alternative with demonstrably less racially adverse impact was available and nonetheless rejected.

In rejecting petitioners' Title VII claims the Second Circuit cited its own view that respondents "had no good alternatives" to test results with racially disproportionate results. But if there are "no good

alternatives" to concededly job-related tests, Title VII cannot be violated by promotions in accordance with their results, and fear of Title VII suits cannot justify refusal to honor the results.

The Eleventh Circuit has clearly rejected the argument that adverse impact alone is a sufficient basis for abandoning results of content-valid employment exams. *Afro-Am. Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719, 723-725 (CA11 1987).[13] The court held that without a demonstration of racial bias beyond mere statistical evidence of disparate impact "it would be impossible for the City to know which alternative—abandonment of the results or promotions based on the results—would be the racially neutral option." *Id.*, at 724.

The Second Circuit's improper equation of adverse impact and intentional discrimination permits employers to short-circuit this analysis and leapfrog from racial disparity to racial remedy. The opinion below characterized the exams as "presumptively flawed" based solely on their demographic results and thus justified respondents' refusal to consider the

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[13] The context of *Afro-American Patrolmen's League* differed from this case only in the source of the nondiscrimination requirement that was claimed to be violated—there, a consent decree from an earlier Title VII case requiring that "race shall play no part and shall be no criterion or factor" in promotion decisions. 817 F.2d, at 721-722, 723 n.4.

results without regard for whether the exams actually served their *purpose*—that is, accurately screened out the unqualified and distinguished among the qualified. App. 4a; see *Griggs*, 401 U.S., at 430 ("Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications."); *McCosh* v. *City of Grand Forks*, 628 F.2d 1058, 1063 (CA8 1980) (declining to second-guess reasonable job criteria for promotion to police sergeant given the risk to public safety of hiring the unqualified). Yet respondents conceded they discerned no flaws in the exams, were *not* contesting their validity, and were instead resting their entire defense on a "good faith" belief that they *might* someday discover equally valid alternatives to these valid tests. App. 1016a-1037a.

Respondents' refusal to honor the results of these tests, and their stated intent to continue to search for an alternative exam, were a superfluous and illegitimate response to circumstances from which no racial discrimination could legitimately be inferred. Without any valid basis for discerning unlawful discrimination from mere statistical disparity, the Second Circuit legitimated intentional racial discrimination against nonminorities as a "remedy" whenever an employment test displays racially disproportionate results. And going a step further, the Second Circuit suggests that, even if this is not the law, employers are "protected" from liability for having acted like it was.

If permitted to stand, the judgment will ineluctably lead to *de facto* racial quotas.[14] Twenty years ago, this Court addressed concerns that disparate-impact theory would lead to "perverse results," such as employer resort to disguised quotas and preferential treatment as a preferred alternative to litigation, and took particular note that in enacting §2000e-2(j) Congress "so clearly and emphatically expressed its intent that Title VII not lead to this result" that evidentiary standards were necessary to "serve as adequate safeguards" against it. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 992-993 (1988) (plurality opinion). The *Watson* plurality denied any license to employers "to adopt inappropriate prophylactic measures" to avoid disparate impact suits. "Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today." *Id.*, at 993.

Safeguards are even more crucial in the public sector. "Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution . . . and it has long been recognized that legal rules leaving any class of employers with

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[14] See Selmi, Was The Disparate Impact Theory A Mistake?, 53 UCLA L. Rev. 701, 742, 757-65 (2006) (noting most written examinations today still have substantial disparate impact and some governmental employers welcome disparate impact challenges to written examinations as a means to achieve "desired political goals" or respond to pressure for "diversity").

'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Ibid.* (quoting *Albemarle*, 422 U.S., at 449).

Nevertheless, the Second Circuit declared that New Haven, with "no good alternatives" to a concededly valid promotional process, had no choice but to adopt a drastic and injurious measure, sanctioned by neither Title VII nor the Constitution: depriving unquestionably qualified officers of career advancement and leaving the command structure of a first-responder agency gutted until a greater number of minorities qualify for the positions. Worse yet, the Second Circuit endorsed the district court's suggestion that a government may elect such a course merely as a political expedient.

C. Divisions Among The Circuits In Applying The Disparate Impact Framework To Civil Service Testing Strongly Counsel Review By The Court.

The approach adopted by other circuits highlights the deep divide between the Second Circuit and other courts that have considered factually similar scenarios. In particular, the Seventh Circuit not only recognizes the demonstration of content-valid exam alternatives as an essential element of the framework, but has consistently held that conjecture, vague proposals and *ipse dixit* assertions regarding alternatives will not suffice and would "frustrate [the]

statutory scheme" of Title VII. *Allen* v. *City of Chicago*, 351 F.3d 306, 313 (CA7 2003); *Gillespie* v. *Wisconsin*, 771 F.2d 1035, 1044-1046 (CA7 1985). In a district beset by such claims, the Eighth Circuit likewise held those challenging job-related exams with disparate impact must meet this statutory burden in all respects. See *Stewart* v. *City of St. Louis*, 2007 WL 1557414 (ED Mo. May 25, 2007), aff'd *per curiam*, 532 F.3d 939 (CA8 2008). The Eleventh Circuit, too, has firmly required a demonstration of racial discrimination beyond simple reliance on statistical evidence of disparity before an employer may legitimately choose between two potentially discriminatory responses to disparate exam results. *Afro-Am. Patrolmen's League*, 817 F.2d, at 724. With civil service exams remaining a magnet for disparate impact claims, the plain need for a uniform interpretation and application of the Equal Protection Clause and Title VII's prohibition on discriminatory employment practices strongly counsels in favor of review.

III. Lower Courts Clearly Need Guidance In The Proper Application Of 42 U.S.C. §2000e-2(*l*).

As part of the 1991 amendments to Title VII, Congress, in plain terms, declared:

> "It shall be an unlawful employment practice for a respondent, in connection with the selection [of] . . . candidates for . . . promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of,

> employment related tests on the basis of race . . . . " 42 U.S.C. §2000e-2(*l*).

According to respondents, this provision eliminated any option other than refusing to honor the test results; they argued that *Dean, Quinn*, and other circuit decisions stand for the proposition that "courts do not look fondly upon cities' attempts to alter eligibility lists or alter the manner in which the lists are used" and thus "employers that find adverse impact in their tests should not certify the results." App. 947a; Appellee's Br. 79.

The ramifications of this untenable proposition are obvious—employers who are forbidden from tampering with test results based on race will be able to invalidate the results altogether for the same impermissible reason. The district court held §2000e-2(*l*) was not violated, absent use of "*different* cut-offs for different races or altering scores based on race." App. 38a n.9 (quotation omitted). The Second Circuit echoed respondents' argument that they had "no good alternatives." But in prohibiting employers from "otherwise alter[ing] the results" of tests for reasons of race, Congress did not intend to permit them simply to ignore or refuse to act on the results for the same reason.

The court's constriction of this provision sanctions the anomalous outcome: a "remedy" for race-based scoring disparities far more drastic and injurious to petitioners than "race-norming" the test results

would have been.[15] It is counterintuitive to suggest Congress intended the 1991 amendments to swell the ranks of those harmed by race-based measures. Equally implausible is the suggestion that public employers may so easily avoid §2000e-2(*l*). The court ignored the provision's third and much broader proscription on "otherwise alter[ing]" results. Far from being an aimless surplusage, the catch-all provision has an evident congressional purpose—to account for the myriad other means by which employers might accomplish the same prohibited ends as respondents did in this case.

The Fifth Circuit addressed §2000e-2(*l*) in *Dean* v. *City of Shreveport* and construed it to forbid all means that have the practical effect of prohibited acts. The court added that it would invalidate any such measures under Title VII even if they passed muster under the Equal Protection Clause as a permissible form of affirmative action. 438 F.3d, at 462-463. In contrast, the Seventh Circuit has refused to adopt a literal interpretation of §2000e-2(*l*). In *Biondo*, Judge Easterbrook suggested dispensing with rank-ordered promotions in favor of score "banding" and pooling candidates within a defined score spread as a means to lessen disparate impact. *Biondo*, 382 F.3d, at 684.

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[15] In *Bushey*, the Second Circuit approved race-norming of test results because it viewed resulting harm to nonminorities as tolerable since none were actually *displaced* from eligibility lists. See 733 F.2d, at 223.

Adopting score banding for the purpose of remedying an exam's disparate impact, it seems, would flout the proscriptions of §2000e-2(*l*). And it makes little legal or practical sense to interpret Title VII to displace state and local laws that, like New Haven's charter, mandate rank-ordered selections, particularly in the case of a public employer with a demonstrated history of abusing any increase in discretion to engage in intentional reverse discrimination and political horse-trading.[16] Indeed, it was respondents' alleged use of a similar device to discriminate against whites and favor the politically connected that led the Connecticut Supreme Court to condemn its adoption. *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005). Finding that New Haven's rounding of scores and banding of candidates vitiated the rule-of-three and violated "the spirit and the letter" of the law, a unanimous Connecticut Supreme Court declared that permitting officials to select from among a large group risks blessing "a subterfuge for discrimination and favoritism, in contravention of the purpose of the civil service rules." *Ibid.* The record in *Kelly*, the court noted, included ample evidence in New Haven "of exactly the abuse of discretion based upon nepotism and racism that the civil service system is meant to prevent." *Id.*, at 1000 n.40.

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[16] The panel's conversion of its summary order to an opinion with full precedential force further imperils local laws mandating merit-based systems of hiring and promotions in civil service, laws which Congress did not intend to displace. See 42 U.S.C. §§2000e-2(h); 2000e-2(j); 2000e-7.

The lower courts construed §2000e-2(*l*) in a manner inconsistent with its text and evident purpose. The Fifth Circuit, on the other hand, has applied it strictly and suggested that measures like those adopted by respondents would violate §2000e-2(*l*). The Seventh Circuit has construed it as flexible enough to permit a practice that the Connecticut courts condemn as contrary to state interests and which, notably, New Haven voters rejected at the polls. Compare *Biondo*, 382 F.3d, at 684, with *Kelly*, 881 A.2d, at 1001 n.41. Given the significance of this provision to the many civil service tests which come under challenge, this Court should grant review to resolve these competing interpretations of a critical civil rights provision.

IV. Review Will Serve The Public Interest In Efficient And Competent Delivery Of Vital Services And Provide Needed Clarity For Local Officials.

The Second Circuit's flawed construction of Title VII and the Equal Protection Clause has serious ramifications for public safety and security. At unconscionable risk to public and firefighter safety, the command structure of a first-responder agency remained gutted while respondents purported to conduct studies and continue exploring for alternatives to perfectly legitimate civil service tests.

Petitioner Matthew Marcarelli scored first on the captain's exam. This could hardly have surprised

anyone. He has consistently scored at the top of the pack in every civil service exam he has taken, not because he is white, but because he has extraordinary credentials, education, and experience. App. 392a-401a. He was denied a well-deserved and justly earned promotion to captain, and the public was and is denied the benefit of his service in that leadership position. Also thwarted was the compelling public interest in treating Marcarelli fairly without regard to the color of his skin. The lower courts agreed with respondents' assertion that the issue of alternatives is "for another day," but neither the government's primary duty to protect the citizenry nor its duty to treat all people equally should be made to wait another day.

The field of emergency response has been taken to new technical and scientific heights. This case did not involve entry-level jobs or aptitude tests. As the job analyses, test syllabi, and the actual exams reveal, considerable scientific and tactical knowledge, skills, and abilities are needed to lead first responders whose own safety and that of others depends on it. If the district court were to have focused on any policy considerations, it was public and firefighter safety that should have been foremost, not the political interests of elected officials.

Promoting merit selection for public employment will improve government services and ensure fairness to those discriminated against, two compelling reasons to grant certiorari in this case. Another is to

provide clarity to officials caught between a rock and a hard place. The Seventh Circuit, for example, has observed that for thirty years the City of Chicago has been largely unable to administer civil service examinations for its public safety agencies without protracted litigation commenced either by unsuccessful examinees alleging disparate impact or the successful alleging their own rights were trammeled. See *Adams* v. *City of Chicago*, 469 F.3d 609, 610 (CA7 2006), cert. denied, 127 S.Ct. 2141 (2007). Rather than avoiding a similar path in this case, the Second Circuit embarked on it, deciding these important issues in a manner that guarantees states and municipalities will have to brace for litigation every time they administer a job-related examination, at great cost to the public and those who invested and sacrificed much in reliance on the promise of a merit-based system, only to be told their efforts were for naught because they are of the wrong race.

The persistent conflicts over proper application to the civil service of Title VII's and the Constitution's competing guarantees and prohibitions demonstrate the need for this Court's review. This case will allow the Court to settle these questions, giving clarity to officials charged with enforcing civil service laws, improving the delivery of essential services to the

public, and vindicating the rights of employees to equal treatment under the law.

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